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In The

Supreme Court of the United States

October Term, 1994

PENSACOLA CONSTRUCTION CO.,

Petitioner,

vs.

TYGER CONSTRUCTION COMPANY, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

In its Brief in Opposition, Tyger Construction Co. has misrepresented both the actions taken by the trial judge and the opinion issued by the Fourth Circuit in this case.

Tyger states that the trial judge held that a jury may consider "any opinion that the expert renders," if the expert is properly qualified. This statement is taken so far out of context that it totally distorts beyond recognition the ruling by the trial court. The trial judge at the time this opinion was rendered was ruling on Tyger's Motion in Limine to exclude expert testimony. The essence of the ruling by the trial court was that judgment on the qualifications of Pensacola's experts would be reserved until trial and that the objections of Tyger concerning alleged deficiencies in the conclusions of the experts were appropriate subjects for cross-examination and not a Motion in Limine. (J.A. 1273-79, 1372-73). The trial judge's preliminary holding on the question of expert testimony is set forth in the Appendix, pp. 42-48. As seen in that excerpt, Judge Smith did not abandon, as Tyger mistakenly asserts, "her duty of making any preliminary assessment, allowing every utterance of the expert to be evaluated by the jury." The ruling by the trial court on the Motion in Limine was in accord with Federal Rule of Evidence 705.

Similar to the misrepresentation of the trial judge's actions, Tyger further misrepresents the Fourth Circuit's opinion. In its opinion the Fourth Circuit clearly, but contrary to the law, weighed the evidence in the case for the purpose of determining whether the expert's testimony was admissible. The Fourth Circuit determined that the opinion of Pensacola's expert was unfounded. This

determination was reached even though the Fourth Circuit noted that the figures for the expert's conclusions were derived from numerous documents, including: (a) the work sheet of Ken Chambless, who was the costs accountant for Tyger on the project; (b) cost reports prepared by Tyger detailing the amount the project cost for each month it over ran; (c) actual sand inventory from the Shirley pit, Eppes Island and Hula Chisman; (d) the original sand estimate for the Waitman pit; (e) daily reports; (f) summary production reports; and (g) other reports (App. 9). In spite of all of this evidence and other evidence, including personal site visits on which the expert could and did base his opinion, the Fourth Circuit independently weighed the evidence concerning the testimony of witnesses on the project as to (a) the cause of delay on the project and the existence of sand stockpiled on the project (App. 14-15), (b) the comparability of two different mines (App. 16-17), and (c) the efficiency of a mine (App. 16-18). After weighing this evidence and ignoring the substantial documentation relied upon by Pensacola's expert in performing his calculations, the Fourth Circuit erroneously chose to believe other witnesses and based on that declared that the opinions of Pensacola's expert should have been excluded. Although the Fourth Circuit cited Federal Rules of Evidence 703 and 705, the Court made no finding that the expert's testimony was not admissible under either of those rules. (App. 13). In fact, the Court's finding is contrary to Federal Rule of Evidence 705 since the Court stated:

> It was an abuse of discretion for the trial court to admit McCoy's testimony that the delays in construction were caused by a lack of, or inefficiencies in the production of, sand. **This**

> **error resulted from the trial judge's belief,** expressed at the time it denied the motion in limine as to McCoy's testimony, **that the question of whether an expert's opinion had an adequate basis in fact should be handled by opposing counsel through cross examination and in jury argument.** (Emphasis added).

The Fourth Circuit thus held that the testimony of Pensacola's expert should have been excluded not because the expert's method was unreliable, but because the court after independently weighing the evidence chose to disbelieve the conclusions reached. (App. 18). The crux of this case is that the Fourth Circuit has established an erroneous standard both of judicial review of expert testimony and admissibility of such testimony.

ARGUMENT

1. **The decision below reveals discord within and among the federal courts of appeal on the proper manner in evaluating objections to expert testimony that concern the reasonableness of the expert's conclusions rather than the reliability of the expert's methodology.**

In its brief, Tyger cites a number of opinions that purport to support the action of the Fourth Circuit in this case. However, the existence of decisions supporting the action taken by the Fourth Circuit only supports Pensacola's contention that the various courts of appeal have handed down conflicting opinions on the issues raised in Pensacola's Petition. Tyger has in no way shown how the decisions cited by Tyger can be harmonized with those cited by Pensacola. Nor is a logical harmonization of the conflicting opinions possible. Additionally, many of the decisions cited by Tyger do not support its contention

but, in effect, are the majority view espoused by Pensacola that objections concerning weaknesses to the underpinnings of an expert's conclusions go to the weight of the evidence and not its admissibility, and thus are to be decided by the trier of fact. *United States v. L.E. Cooke Co.*, 991 F.2d 336, 342 (6th Cir. 1993); *Jones v. Otis Elevator Co.*, 861 F.2d 655, 662-63 (11th Cir. 1988).

2. The decision below is not in accord with *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, or *Delaware v. Fernsterer.*

Tyger insinuates that the cases cited by Pensacola as representing the majority view of deciding on the admissibility of expert testimony have been displaced by *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S.Ct. 2786 (1993). Such an assertion is inaccurate. First, this Court in *Daubert* addressed only the issue of the admission of novel scientific evidence and the validity of the *Frye* test. *Daubert*, 113 S.Ct. at 2795, n. 8; 2799-2800 (Rehnquist, C.J. and Stevens, J., concurring in part and dissenting in part). *Daubert* also focuses on only "principles and methodology, not on the conclusions that they generate." 113 S.Ct. at 2797. Thus *Daubert*, while providing some "general observations," *see id.* at 2796, 2799-2800, does not specifically address the issues presented in this case. That is especially true since *Daubert* deals with a Motion for Summary Judgment which was granted based on expert testimony as to a prescription drug and how the Court is to deal with the reliability of such testimony when considering a Motion for Summary Judgment. It is entirely different from this case since no cross examination was involved in *Daubert*, and hence the applicability of Federal Rule of Evidence 705 was not an issue as it is here.

To the extent that *Daubert's* general observations apply to the issues presented, these general observations do not support the action taken by the Fourth Circuit in this case. In an opinion discussing at great lengths the *Daubert* decision, the Sixth Circuit Court of Appeals noted that "the *Daubert* Court has instructed the courts that they are not to be concerned with the reliability of the conclusions generated by valid methods, principles, and reasoning." *United States v. Bonds*, 12 F.3d 540, 556 (6th Cir. 1993). The court in *Bonds* went on to state that conflicting testimony concerning the conclusions drawn by experts ordinarily go to the weight of the testimony rather than its admissibility. *Id.* at 563. The Sixth Circuit then held that the trial judge did not err in refusing to consider disputes concerning the accuracy of a test in determining its admissibility. *Id.* at 564.

In another "post-*Daubert*" decision, the Third Circuit rejected the type of review to be performed by a trial judge in accessing the admissibility of expert testimony now mandated by the Fourth Circuit's opinion. *Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Company, Inc.*, 998 F.2d 1224, 1236-1241 (3rd Cir. 1993). Similarly, the First Circuit continues to state the rule that the burden of revealing weaknesses of the basis for an expert's opinion is on the cross-examiner and that weakness in the factual underpinning of expert's opinion is a matter affecting weight and credibility to be decided by a jury. *Newell Puerto Rico, Ltd. v. Rubbermaid Inc.*, 20 F.3d 15, 19-22 (1st Cir. 1993). These opinions of the First, Third and Sixth Circuits are in accord with Federal Rule of Evidence 705, which as noted below places the burden on the cross examiner of the expert to expose the weakness and lack

of foundation or factual basis for any expert opinion which is rendered:

> **The expert may testify** in terms of opinion or inference and give reasons therefore **without first testifying to the underlying facts** or data, unless the court requires otherwise. **The expert may** in any event be **required to disclose the underlying facts or data on cross-examination.** (Emphasis added).

Notwithstanding these opinions, and Federal Rule of Evidence 705, other courts continue to publish decisions in which the sufficiency of the factual basis for an expert's conclusions are probed by the appellate court to determine admissibility. *E.g., Joy v. Bell Helicopter Textron, Inc.*, 999 F.2d 549, 567-70 (D.C. Cir. 1993). Again, the existence of these conflicting opinions on this important issue exposes the absolute need for clarification by this Court.

In addition to *Daubert* and the decisions construing it, the opinion of this Court that most directly addresses the issues presented is *Delaware v. Fernsterer*, 474 U.S. 15 (1985). *Delaware v. Fernsterer* received no comment by Tyger, even though it directly applies to the issues presented. In *Delaware v. Fernsterer* this Court ruled that alleged deficiencies in the bases for an expert's conclusions go to the weight of the evidence, and not its admissibility. Again, the decision by the Fourth Circuit is contrary to this opinion.

After noting that the Fourth Circuit's opinion is based on *Daubert* and the Federal Rules of Evidence, Tyger attempts to fit the Fourth Circuit's opinion into the *Daubert* rubric. In doing so, Tyger misstated the actions taken by the Fourth Circuit and ignored the issues raised. The essence of the opinion by the Fourth Circuit is that

the trial court abused its discretion by allowing Pensacola's expert to testify in the first instance. Again, such a position is contrary to *Daubert* where this Court, following Federal Rule of Evidence 705, would allow such testimony and placed the burden on the cross examiner as follows: "vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." 113 S.Ct. at 2797.

In *Daubert*, this Court then went on to set out how the trial court, not the Court of Appeals, should handle the situation where the scintilla of evidence is insufficient to support the expert testimony stating:

> Additionally, in the event the trial court concludes that the scintilla of evidence presented supporting a position is insufficient to allow a reasonable juror to conclude that the position more likely than not is true, the court remains free to direct a judgment, Fed.Rule Civ.Proc. 50(a), and likewise to grant summary judgment, Fed.Rule Civ.Proc. 56. *Id.* at 2799.

Although the Fourth Circuit cites to Rules 703 and 705, it performs no analysis as to the application of those rules to the case before it. (App. 13). The Fourth Circuit does not hold that the facts or data relied upon by the expert were not of the type reasonably relied upon by experts, that the reasoning or methodology of the expert was invalid or not properly applicable to the facts in issue, that the testimony of the expert witness would not have assisted the trier of fact, or that the probative value of the evidence was substantially outweighed by the danger of *unfair* prejudice. (App. 13-20). Instead, the Fourth Circuit erroneously weighed the various evidence and thus did

not endeavor to analyze the admission of the expert testimony within the confines of the legislatively enacted rules of federal evidence. As such, the decision is inadequate and erroneous. *See Daubert,* 113 S.Ct. at 2793-94.

3. The decision of the Fourth Circuit in weighing evidence in reviewing the reasonableness of an expert's opinion usurps the fact finding function of a jury in violation of the Seventh Amendment.

In its Brief in Opposition, Tyger alternatively states that the Fourth Circuit did not weigh the evidence to determine the admissibility of expert testimony and that *Daubert* requires trial judges to weigh evidence in determining admissibility. Both propositions are incorrect.

The Fourth Circuit clearly weighed the evidence in determining the admissibility of expert testimony. The Fourth Circuit determined that the testimony of certain fact witnesses was more persuasive than other fact witnesses to refute the conclusions reached by the expert witness. On this basis, the Fourth Circuit overturned substantial portions of the jury's verdict. Thus, under the guise of ruling on the admissibility of expert testimony and without adhering to the standards of review set forth in the Rules of Civil Procedure and accepted federal practice, the Fourth Circuit held that Tyger was entitled to a judgment as a matter of law. In so doing, the Fourth Circuit exceeded the acceptable bounds of controlling verdicts and encroached upon Pensacola's Constitutional right to have factual issues determined by a jury.

Contrary to the statements by Tyger, the Federal Rules of Evidence and *Daubert* do not sanction the action taken by the Fourth Circuit. While *Daubert* does interpret

the rules to allow for a preliminary investigation of the validity of scientific methodology utilized by experts, nothing in *Daubert* or the Federal Rules of Evidence authorizes a review of all of the evidence in a case to determine whether an expert's conclusions are consistent with the evidence presented. Such a review is reserved to the finder of fact.

The critical distinction between *Daubert* and the present case is that *Daubert* concerns a preliminary evaluation of the validity of a novel scientific methodology whereas the present case concerns an evaluation of the conclusions reached by an expert witness in light of all of the evidence presented. Unlike the validity of scientific methodology, the conclusions reached by experts often relate to ultimate facts. Thus, when reviewing the conclusions of experts, a court is also reviewing the sufficiency of the evidence on the ultimate facts to be decided.

In the present case the Fourth Circuit held that Pensacola could not submit expert testimony after the Fourth Circuit weighed the evidence and made factual conclusions that Pensacola failed to prove by a preponderance of the evidence that no damages associated with delay were caused by alleged misrepresentations (App. 14-15), that certain pit mines were not similar thereby precluding comparison and invalidating the calculation of damages (App. 16-17), and that an alternate pit mine was not less efficient to operate than an original mine (App. 16-18). Notably, the Fourth Circuit performed this review without limiting itself to the confines imposed on appellate courts in reviewing the denial of motion for judgment as a matter of law. In addition, these conclusions were reached by the Fourth Circuit even though there was evidence to support the contrary result, which evidence

the jury and the trial court both obviously believed since the jury rendered the verdict and the trial court denied the after-trial motion.

The review and weighing of evidence performed by the Fourth Circuit impermissibly encroached on the province of the jury. Such a practice infringes on the Seventh Amendment's guarantee of trial by jury. *Granberry v. O'Barr*, 866 F.2d 112 (5th Cir. 1988); *Wood v. Diamond M. Drilling Co.*, 691 F.2d 1165 (5th Cir. 1986).

This does not mean that trial judges cannot exercise control of expert testimony or of judgments supported by expert conclusions. Such control, however, must be exercised within the confines of the Federal Rules of Evidence and Civil Procedure to avoid impermissible encroachment on the fact finding function of the jury. In this case, the Fourth Circuit overstepped its bounds and has established a precedent which negates the Federal Rules of Evidence and throws courts and triers of facts into a quandary in all civil cases in the future utilizing expert testimony.

CONCLUSION

For the reasons stated in this and in Petitioner's Petition, this Court should grant the Writ of Certiorari to hear and determine the issues presented in the Petition.

Respectfully submitted,

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